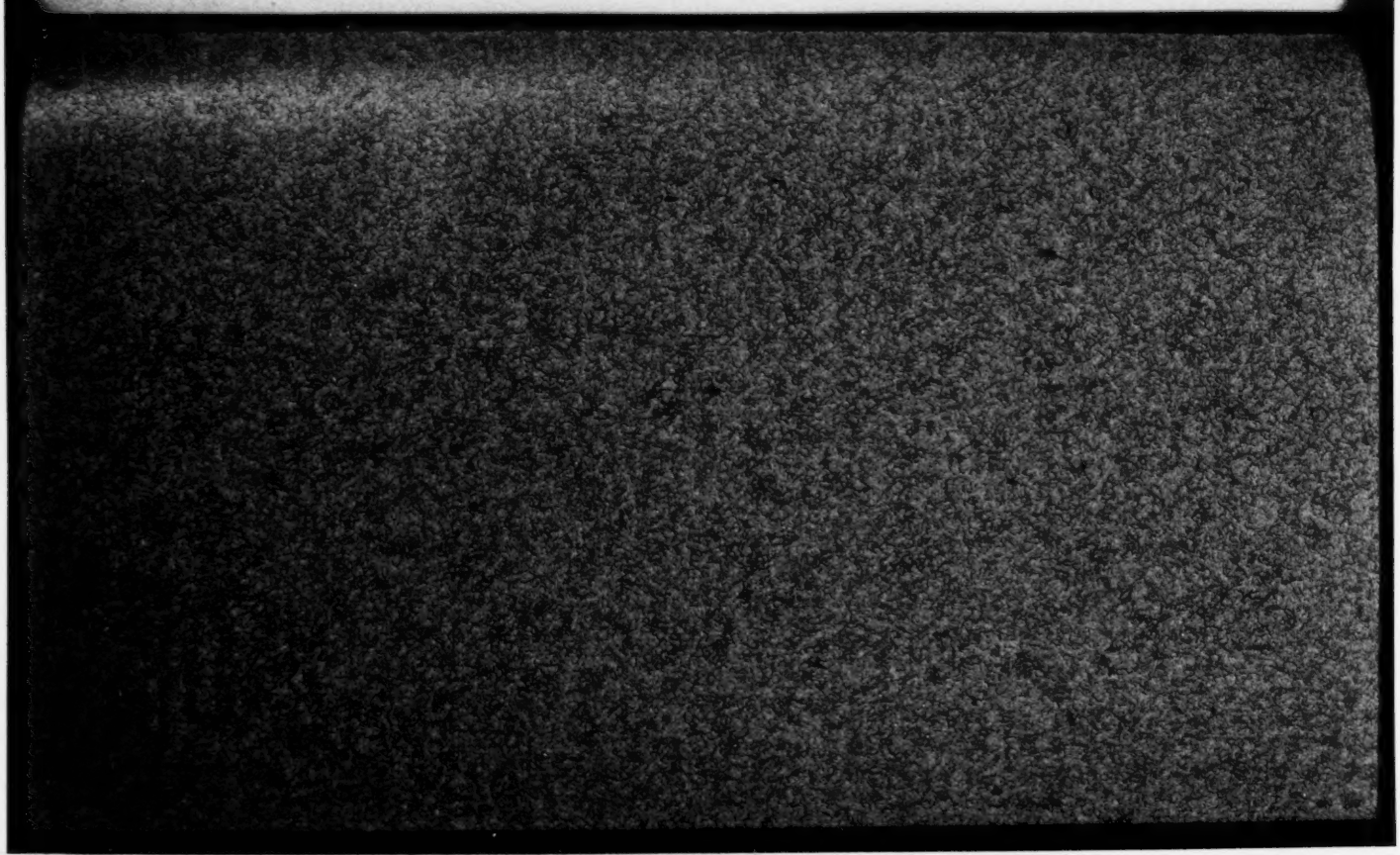

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 264.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF INDIANA ex rel. WILLIAM A. KETCHAM, Attorney General, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR THE PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

This is a writ of error to revise a judgment of the Supreme Court of Indiana which affirmed a judgment of the Superior Court of Marion County, Indiana, in favor of the State of Indiana against the Terre Haute & Indianapolis Railroad Company for $913,905.01, on the ground that certain statutes of the State of Indiana passed in 1897, on which the suit is based and to which the judgment gives effect, are repugnant to the contract clause of the Constitution of the United States (section 10, article 1) and to the Fourteenth Amendment, and that property of the plaintiff in error has been taken without due process of law and that it has been denied the equal protection of the laws, in contravention of the Fourteenth Amendment.

The motion to dismiss or affirm is not based on the ground that the Railroad Company did not raise the federal questions on which it relies in due time and by proper pleadings in the Superior Court of Marion County, but on the ground that its claims of immunity under the federal constitution are not well founded, and that the State court properly overruled them. But that goes to the merits of the case, on which the Company desires to be heard in oral argument, and we therefore request that the motion be postponed to the merits. If the motion to dismiss or affirm had been made shortly after the case was docketed in this court, or after the record had been printed, other considerations might govern, but it has been delayed until the case is on the eve of being reached for argument. We feel at liberty therefore to confine ourselves now to a bare suggestion of the argument which we intend to develop at the hearing on the merits.

I.

The immunities claimed by the Company under the federal constitution were properly and specifically presented in the State court, first, by the demurrer to the complaint (Rec. 36) and, when that was overruled, by various defenses set up in the answer (Rec. 47, 50, 60), and were preserved by proper assignments in the Supreme Court of Indiana, and by an assignment of errors annexed to and returned with the writ of error issued by this court in compliance with Rev. Stat. U. S. sec. 997. Rec. 687. The demurrer challenged the complaint on the ground that "it seeks to take from this defendant property in which it has vested rights by virtue of its original charter and the amendments thereof, and by virtue of the judgment of this honorable court in the complaint set forth, and to accomplish this result invokes the aid of laws enacted by the General Assembly of the State of Indiana at its regular session in 1897, which said laws and all the acts and doings of the plaintiff in attempting to deprive defendant of its property and to invalidate said judgment are in violation of section 10 of article 1 of the Constitu-

tion of the United States, and of article 5, and section 1 of article 14 of the amendments to said Constitution." Rec. 36. The answer, at the several pages pointed out, challenged the validity of the Acts of 1897 and of the State's proceedings thereunder, in the same terms.

II.

The charter granted to the Company by the State of Indiana, January 26, 1847, gave the corporation the right to "charge and receive such tolls and freights * * * as shall be for the interest of said company, and to change, lower, or raise at pleasure" (sec. 22), and to make "semi-annual dividends of so much of the profits as the corporation may deem expedient," and to "retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper" (sec. 24). Rec. 20. The present suit is based on section 23 of the Act which reads as follows (Rec. 20):

"That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, *the legislature may so regulate the tolls and freights* that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum can not be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same."

The legislature never regulated the tolls and freights and never required the company to furnish a statement of its expenditures, expenses or profits.

On January 17, 1873, the Company duly surrendered its charter in pursuance of sec. 36 of the general railroad law of the State passed May 11, 1852, to-wit:

"Sec. 36. Any existing railroad company may acquire all of the powers or benefits conferred by this act by filing an acceptance thereof in the office of the secretary of state, properly attested as the corporate act of such company. *The acceptance of any part of this act shall be deemed and taken to be an acceptance of the whole act and a surrender of the act under which such company may be organized*; and, thereupon, said company shall possess such powers so accepted and be subject to the obligations and restrictions herein specified as fully as it would have had and been if organized under this act."

On May 28, 1875, the State commenced an action against the Railroad Company in the Superior Court of Marion County to recover the same moneys claimed to be due to the State in the present suit, under sec. 23 of its charter. Rec. 22. The suit was brought in pursuance of a written agreement between the Company and the State, executed by Governor Hendricks, the Lieutenant Governor and the Attorney General under a joint resolution of the General Assembly, which provided that the State should institute an action "in the Superior Court of Marion county for the recovery of any money which may be due the State or the school fund of the State, under and by virtue of said companies' charter of January 26th, 1847, and the amendments thereto." The Company agreed to enter its appearance and stipulated "that if in making up the issues and on the trial of said cause it can be shown under the law, and the evidence that is adduced, that any money is due to the State or school fund of the State from said old company or companies (by whatsoever name or names) under and by virtue of said charter and amendments thereto and the law and facts applied thereto, then and in that case, the company as now organized shall pay such amount and judgment shall be rendered in said action for money, for the sum that may be found due." Rec. 48, 49.

The Company appeared and demurred to the State's complaint, which was identical with the complaint in the present suit, except the references in the latter to the unconstitutional legislation of 1897. The court sustained the demurrer and on May 9, 1876 dismissed the action on the ground that section 23

of the charter did not require the Company to account to the State for surplus profits in the absence of legislation regulating its tolls. (See the opinion of the court filed on sustaining the demurrer, Rec. 607). The State appealed to the Supreme Court of Indiana, where the judgment was affirmed in 1878 on the ground of irregularity and insufficiency of the record, without passing upon the merits. State vs. Terre Haute & Indianapolis R. R. Co. 64 Ind. 297.

It was supposed that the surrender of the Company's charter in 1873, followed by the foregoing judgment in its favor in 1876, affirmed by the Supreme Court of Indiana in 1878, put at rest the claim that the Company was liable to the State under section 23 of its charter. That view seems to have been acquiesced in for twenty years or more until 1897, when the legislature passed four statutes, which, for flagrant violation of constitutional guaranties, are without a parallel in the history of legislation. They are set forth at pages 9, 12, 15 and 17 of the State's brief on its motion to dismiss or affirm. By the first of these acts passed January 27, 1897, the legislature, notwithstanding the surrender of the Company's charter and the prior adjudication in its favor, recited that "it has been made known to this general assembly that a large amount of money is due to the State of Indiana for the use of the common schools under this section," and ordered the Company to file a statement of its receipts, expenditures, profits and the disposition thereof from January 26, 1847, to January 17, 1873, inclusive.

The second act passed February 18, 1897, undertook to amend the statute under which the Company had surrendered its charter, twenty-four years before, by providing that "whenever any railroad company * * * shall have heretofore accepted the provisions of the general railroad law, * * * all rights and liabilities, whether inchoate or complete, in favor of the State of Indiana, shall be, and they are hereby, expressly reserved to said State, *notwithstanding said acceptance* and said State may hereafter, by appropriate legislation, make such provision for the determination and enforcement of said rights as the General

Assembly may deem appropriate and *notwithstanding such acceptance* any and all provisions of said charter may be amended, revised, repealed or *added to* as *though said charter was in full force and effect, and as though said railroad company or companies had not accepted the provisions of said act of May 11, 1852.*"

The third act, passed February 24, 1897, undertook to revive and amend section 23 of the Company's charter, which had been dead and surrendered for twenty-four years, by imposing obligations not found in the original section and by declaring that the right of the State "shall be the same as though this amendment had been originally a part of the charter of said railroad, and, as though a suit to enforce such accounting had been prosecuted prior to the acceptance by said railroad company of the general railroad law."

Having thus declared ex post facto that the Company's surrender of its charter made in 1873 was inoperative, and having revived and amended the surrendered charter to suit itself, the legislature proceeded by the fourth and last act of the series to deal with the surplus profits of the Company, earned between 1847 and 1873, in excess of a certain sum, by saying that "the same are *hereby declared to be due and payable to the treasurer of state for the use of common schools and are hereby appropriated to that purpose.*" (sec. 1), and the Attorney General was directed to sue for their recovery. The present suit was brought for that purpose.

III.

Counsel do not deny that the Supreme Court of Indiana has given *some* effect to the unconstitutional legislation of 1897. Their claim is that the court has treated it only as providing a remedy for obligations otherwise existing, and, that, so regarded and to that extent, it is not repugnant to the Federal Constitution. It is true that the Court says in its opinion "that the respective rights and liabilities of the parties must now be determined by the contractual relations entered into in 1847 in the same way as if the legislation of 1897 had never been en-

acted," and that the legislation of 1897 may be considered out of the case "except as conferring certain powers upon the Attorney General and as defining the procedure whereby the claims asserted by the State as arising under the original charter, may be fully and fairly contested with appellant." Rec. 655. But the grounds of the decision as well as the judgment itself, show that the real effect given to the statutes of 1897 by the Supreme Court of Indiana is to *create* obligations which do not otherwise exist, in derogation of the contract between the Company and the State involved in the surrender of its charter in 1873, and the unqualified acceptance of such surrender by the State.

In inquiring whether the legislation of 1897 impairs the contract of 1873, this court will determine for itself the effect of the company's surrender of its charter, so as to see whether any obligation to the State thereunder survived the surrender. If not, none can be lawfully imposed by the legislation of 1897, on the pretense that it provides only a remedy. "There is no doubt of the general proposition that, where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon the contract, though it may differ from that of the Supreme Court of the State." 180 U. S. 44. "When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and, also, all of that which is claimed to have taken it away." 192 U.S. 85.

The opinion of the Supreme Court of Indiana in other parts contradicts the theory that the legislation of 1897 provides only a remedy, for it holds that the judgment of 1876 in favor of the Company is not a bar to the present suit for the reason that *no cause of action* existed in 1875 in favor of the State. The court says "No duty rested upon the corporation to pay any sum to the treasurer of State, and *no right of action rested in the State for the recovery of money, with or without demand.* The duty to account when required, as imposed by section 23, means nothing more or less than the duty to settle, and pay over to the treasurer of State any surplus disclosed when requested or

demanded by the legislature to do so. * * * We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the general assembly. This request was not made until 1897, *and no actionable default by appellant had occurred prior to that date.*" Rec. 668, 669.

Again,

"When the Attorney General commenced the suit of 1875 *the State had no right of action* against appellant." Rec. 672.

And in refusing to give effect to the judgment in that action, on the ground that it was not an adjudication on the merits, the court says:

"There can be no merits where there exists no cause of action." Rec. 672.

But if the State had no cause of action in 1875, which was two years after the Company had surrendered its charter unconditionally and without reservation; if nothing was due to the State at that time, because no default on the part of the Company had then occurred, the effect necessarily given, by the judgment under review, to the legislation of 1897 is not merely to provide a remedy, but to impose an obligation and create a right.

The effect of the surrender of the charter in 1873 involves an inquiry into the extent of the obligation imposed by the surrendered charter. That inquiry this court will make for itself, and, if it holds, as we contend, that section 23 of the charter of 1847 imposed no obligation on the Company to account for surplus profits in the absence of legislation regulating tolls, no such obligation survived the surrender of the charter in 1873. "The judgment rests upon the construction of the original charter, that is, upon the contract between the State and the bank, but to construe that is also our function * * * When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to our review; and also all of that which

is claimed to have taken it away. We are certainly not confined to the decision under review. To hold that, would surrender the power of review." 192 U. S. 73, 77, 85.

The effect of the surrender of the charter in 1873 is disposed of by the Supreme Court of Indiana in three lines, with the statement that "the acceptance in 1873 of the general railroad law of 1852 had no effect in relieving the appellant from unperformed duties, assumed in its charter contract of 1847." Rec. 673, 674. But this court will construe the charter of 1847 and the contract of surrender of 1873, for itself, in order to determine whether the effect which the Supreme Court of Indiana has given to the legislation of 1897 impairs the obligation of the contracts between the Company and the State, or destroys the vested rights of the Company.

IV.

The Supreme Court of Indiana has treated the legislation of 1897 not only as giving rise to an obligation which would not exist but for that legislation, but has fixed the measure of the Company's liability to the State by provisions found only in the acts of 1897, and not in section 23 of the original charter. The judgment, for instance, holds the Company liable for the net earnings from December 31, 1869, to January 17, 1873, and for the surplus profits remaining since December 31, 1869, deducting therefrom only 15 per cent. on the sum invested, as computed by the court, from January 1, 1870, to January 17, 1873. Rec. 103. No such basis of liability can be found, except in the legislation of 1897.

V.

The judgment treats the tax on dividends paid by the Company to the United States as part of the "dividends declared." Rec. 98. This is an erroneous construction of the Federal Statute, which regards the tax as a debt due from the Company. Railroad Co. vs. Collector, 100 U. S. 595; United States vs. Erie Railway Co. 106 U. S. 327; Bailey vs. Railroad Co. 106 U. S. 109; Memphis, etc., R. R. Co. vs. United States, 108 U. S. 228.

VI.

We recognize the rule that the failure of the court of a State to give effect to a prior judgment of a court of the same State, does not ordinarily present a federal question; but where, after the surrender of a charter, it has been adjudicated between the State and the Company that the Company is not liable to the State under that charter, and in the face of such surrender and adjudication, the State passes, and its courts enforce, legislation providing for a new suit on behalf of the State, and the courts of the State decline to give effect to the prior adjudication, we have a case in which property of the Company has been taken by the State without due process of law, through the instrumentality of its legislative, executive and judicial departments, acting jointly and severally. The provisions of the Fourteenth Amendment refer to all the instrumentalities of the State, including its legislative, executive and judicial authorities. C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226.

There is no color for the motion to dismiss, and in view of the importance of the questions, the amount involved, and the late day at which the motion to dismiss or affirm is presented, we respectfully submit that it should be postponed to the hearing on the merits.

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